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6 Attorneys for Plaintiffs

7  
8 UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10

11 GIL CROSTHWAITE, RUSS BURNS, in their  
12 respective capacities as Trustees of the  
OPERATING ENGINEERS HEALTH AND  
13 WELFARE TRUST FUND FOR NORTHERN  
CALIFORNIA; PENSION TRUST FUND  
14 FOR OPERATING ENGINEERS;  
PENSIONED OPERATING ENGINEERS  
15 HEALTH AND WELFARE FUND;  
OPERATING ENGINEERS AND  
16 PARTICIPATING EMPLOYERS PRE-  
APPRENTICESHIP, APPRENTICE AND  
17 JOURNEYMEN AFFIRMATIVE ACTION  
TRAINING FUND; OPERATING  
18 ENGINEERS VACATION AND HOLIDAY  
PLAN; OPERATING ENGINEERS  
19 CONTRACT ADMINISTRATION TRUST  
FUND; OPERATING ENGINEERS MARKET  
20 PRESERVATION TRUST FUND;  
OPERATING ENGINEERS INDUSTRY  
21 STABILIZATION TRUST FUND; BUSINESS  
DEVELOPMENT TRUST FUND; AND  
22 HEAVY AND HIGHWAY COMMITTEE,

23 Plaintiffs,

24 v.

25 DUN ENGINEERING SERVICES, INC., a  
California Corporation and MARK THOMAS  
26 JONES, an Individual,

27 Defendants.

Case No.: C07-4995 JL

**COMPLAINT TO COMPEL AUDIT**

Parties

1. The Operating Engineers Health and Welfare Trust Fund for Northern California; Pension Trust Fund for Operating Engineers (which includes the Pension Plan for the Pension Trust Fund for Operating Engineers, and the Operating Engineers Annuity Plan); Pensioned Operating Engineers Health and Welfare Fund; Operating Engineers and Participating Employers Pre-Apprenticeship; Apprentice and Journeyman Affirmative Action Training Fund; and Operating Engineers Vacation and Holiday Plan are employee benefit plans as defined in the Employee Retirement Income Security Act of 1974 ("ERISA") § 3(3), 29 U.S.C. § 1002(3). They and their fiduciaries are together referred to herein as "ERISA Plaintiffs." Gil Crosthwaite and Russ Burns are Co-Chairmen of the Joint Boards of Trustees of the ERISA Plaintiffs with authority to act on behalf of all Trustees.

2. Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO ("Union") is a labor organization as defined in § 2(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(5).

3. DUN ENGINEERING SERVICES, INC. ("Dun") and MARK THOMAS JONES ("Jones") are employers by virtue of ERISA § 3(5), 29 U.S.C. § 1002(5), and NLRA § 2(2), 29 U.S.C. § 152(2), and Mark Thomas Jones personally guaranteed payment of fringe benefits. They are referred to herein as "Defendants".

Jurisdiction

4. Jurisdiction exists in this Court over the claims asserted by the ERISA Plaintiffs by virtue of ERISA § 502, 29 U.S.C. § 1132, in that the ERISA Plaintiffs seek to enforce the provisions of ERISA and the terms of their plans, seek to enjoin the acts and practices which violate ERISA, seek equitable relief to redress such violations, and seek all other appropriate relief under ERISA.



Bargaining Agreement

10. The Union and defendants entered into a collective bargaining agreements requiring employer contributions to the Plaintiff Funds, and to the Union for union dues and to other Trust Funds more fully described in the Master Agreement between the Union and the Associated General Contractors of California, Inc., which is incorporated into the Independent Northern California Construction Agreement, and into the Private Work Agreement for Fresno Area ('Fresno'), to which Dun is signatory. That Agreement is referred to herein as the "Bargaining Agreement," and the ERISA Plaintiffs and Trust Funds are third party beneficiaries of those Bargaining Agreements.

11. The Operating Engineers Market Preservation Fund, Operating Engineers Industry Stabilization Trust Fund, Business Development Trust Fund, and Heavy and Highway Committee, together referred to herein as "Trust Funds," are funds for which plaintiff Boards of Trustees are the assignees of monies due under the Bargaining Agreement.

12. MARK THOMAS JONES is a guarantor for plaintiffs' claim, pursuant to the terms of the Independent Northern California Construction Agreement.

13. Under the terms of said Bargaining Agreements and of the governing documents of the ERISA Plaintiffs which documents are incorporated into the Bargaining Agreement and made binding on defendants, defendants are required to submit monthly reports of hours worked by its employees, and to regularly pay to the Plaintiff ERISA Funds, to the Union for union dues, and to the Trust Funds, certain sums of money, the amounts of which are determined by the hours worked by employees of defendants, all as more fully set forth in said Bargaining Agreement. Also under the terms of said Bargaining Agreement and the governing documents of the Plaintiff Funds, defendants agreed to pay liquidated damages for each delinquent payment, which become part of the contributions. Defendants further agreed to pay interest on the combined contributions



1 Agreements and made binding on defendants, by failing to permit examination of its records as  
2 alleged. Said refusal is unjustified and done with malicious intent.

3 19. Defendants have a contractual duty under the Bargaining Agreements to timely  
4 make required contributions, liquidated damages and interest to the ERISA Plaintiffs and the  
5 Funds, and to timely make the required payment of union dues to the Union. Defendants failed to  
6 make timely contributions for the periods August 2001-December 2001, December 2002-January  
7 2003, June 2003, August 2004-September 2004, and December 2003-July 2007. By failing to  
8 make such timely payments as required, defendants have breached said duty, incurring liquidated  
9 damages and interest, which defendants have failed and refused to pay.

11 20. Plaintiffs are without an adequate remedy at law and will suffer continuing and  
12 irreparable injury, loss and damage unless defendants are ordered specifically to perform all  
13 obligations required on defendants' part to be performed under ERISA, 29 U.S.C. §§ 1101-1381,  
14 the LMRA, 29 U.S.C. §§ 141-197, the Bargaining Agreements, and the governing documents of  
15 the Plaintiffs Funds referred to therein, and are restrained from continuing to refuse to perform as  
16 required thereunder.

18 21. This Court is authorized to issue injunctive relief based on traditional standard. As  
19 set forth above, plaintiffs have a strong likelihood of success on the merits, there is the possibility  
20 that the Board of Trustees and the participants will suffer irreparable injuries, and the balance of  
21 hardships and advancement of public interest favor plaintiffs.

23 Prayer

24 WHEREFORE, Plaintiffs pray as follows:

25 1. For an order requiring defendants to provide certain records and to submit to an  
26 audit of such records by a date certain for the period January 1, 2004 through date of audit; and

27 ///

1           2.       For judgment against defendants in favor of the ERISA Plaintiffs and the Union, in  
2 an amount equal to:

3                   a.       Any unpaid contributions, due at time of Judgment, including any  
4 contributions determined as due by said audit of defendants' records for the period January 1, 2004  
5 through date of audit pursuant to ERISA § 502(g)(2)(A), 29 U.S.C. § 1132(g)(2)(A);  
6

7                           (1)     To the ERISA Plaintiffs, in accordance with ERISA Section  
8 502(g)(2)(A), 29 U.S.C. Section 1132(g)(2)(A) and the Bargaining Agreements;

9                           (2)     To the Union, in accordance with the Bargaining Agreements;

10                   b.       Liquidated damages in an amount equal to the greater of:

11                           (1)     Interest on the unpaid contributions, or

12                           (2)     Liquidated damages provided for under the Bargaining Agreements  
13 on the aforementioned unpaid and late paid contributions, in accordance with the Bargaining  
14 Agreements, the governing documents of the ERISA Plaintiffs, and with respect to the ERISA  
15 Plaintiffs, ERISA Section 502(g)(2), 29 U.S.C. Section 1132(g)(2).  
16

17                   c.       Interest on any unpaid and late paid contributions and dues, and on  
18 liquidated damages, at the rates and in accordance with the Bargaining Agreements, the governing  
19 documents of the ERISA Plaintiffs, ERISA Section 502(g)(2)(B), 29 U.S.C. Section  
20 1132(g)(2)(B), with respect to the ERISA Plaintiffs, and the applicable legal rate with respect to  
21 dues and where otherwise appropriate.  
22

23           3.       For any additional contributions and dues payable to plaintiffs and the Bargained  
24 Plans as third party beneficiaries of the Bargaining Agreements at time of judgment, plus interest  
25 and liquidated damages as above provided and in accordance with the Bargaining Agreements, the  
26 governing documents of the ERISA Plaintiffs and, with respect to the ERISA Plaintiffs, ERISA  
27 Section 502(g)(2), 29 U.S.C. Section 1132(g)(2).  
28

1           4.       ERISA Plaintiffs' reasonable attorneys' fees and costs of this action in accordance  
2 with ERISA § 502(g)(2)(D), 29 U.S.C. § 1132(g)(2)(D); and in accordance with the collective  
3 bargaining agreements for all Bargained Plans, and with LMRA Section 301, 29 U.S.C. § 185 for  
4 all plaintiffs.

5           5.       For an order,

6                   (a)     requiring that defendants comply with their obligations to plaintiffs under  
7 the terms of the Bargaining Agreements and the governing documents referred to therein;

8                   (b)     enjoining defendants from violating the terms of those documents and of  
9 ERISA; and

10                  (c)     enjoining defendants from disposing of any assets until said terms have  
11 been complied with, and from continuing or operating of defendants' business until said terms have  
12 been complied with.  
13

14           5.       That the Court retain jurisdiction of this case pending compliance with its orders.

15           6.       For such other and further relief as the Court may deem just and proper.  
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18 Dated: September 25, 2007

SALTZMAN & JOHNSON LAW CORPORATION

19  
20 By: \_\_\_\_\_/s/\_\_\_\_\_  
21 Muriel B. Kaplan  
22 Attorneys for Plaintiffs  
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